IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 10.07.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.A.No.659 of 2001

R.Mani .. Appellant/Complainant

vs.

S.Kasiviswanathan .. Respondent/Accused

Prayer:- This Appeal has been preferred against the judgment dated 27.6.2001 made in C.C.No.114 of 2000 on the file of the Judicial Magistrate No.I, Erode.

For Appellant :Mr.N.Manokaran
For Respondent :Mr.G.Saravanan, Legal Aid Counsel

JUDGMENT

This appeal has been preferred against the judgment in C.C.No.114 of 2000 on the file of the Judicial Magistrate No.I, Erode. The complaint was preferred by the power of attorney holder of the complainant under Section 200 of Cr.P.C., against the accused for offence under Section 138 of the Negotiable Instruments Act.

2.After taking cognizance of the offence, the learned Judicial Magistrate has secured the accused by sending summons and on his appearance copies under Section 207 of Cr.P.C., were furnished to the accused and when the offence was explained to the accused and questioned, the accused pleaded not guilty.

3.The short facts of the case narrated in the complaint is that on 1.1.1999 the accused had borrowed a sum of Rs.1,50,000/- as an hand loan and drawn a cheque dated 1.12.1999 in favour of the complainant in order to discharge the said loan. When the said cheque was presented in the City Union Bank, P.N.Palayam Branch, Coimbatore, the cheque was returned with an endorsement that there is no sufficient funds in the account of the drawer of the cheque. The complainant had issued notice to the accused informing the fact that the cheque drawn by him in favour of the

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complainant on presentation in the bank was dishonoured. Since the accused has not sent any reply notice within the time stipulated under section 138 of the Negotiable Instruments Act, the complainant has filed this complaint through his power of attorney agent.

4.P.W.1 is the power of attorney agent, who would narrate what he had stated in the complaint. Through P.W.1, Ex.P.1-power of attorney, Ex.P.2-impugned cheque dated 1.10.1999, bank return memo-Ex.P.3 dated 29.1.2000 sent along with Ex.P.2-impugned cheque, Ex.P.4-debit advice, Ex.P.5-copy of the notice, Ex.P.6-postal receipt, Ex.P.7-acknowledgment for the accused having received the original of Ex.P.5, Ex.P.8-statement of account of the accused, Ex.P.9-copy of cheque return register, Ex.P.10-copy of the signature of the accused and Ex.P.11-account opening register, were exhibited.

5.When incriminating circumstances were put to the accused, he would deny his complicity with the crime. On the side of the accused one Babu was examined as D.W.1. The learned trial Judge after going through the evidence both oral and documentary has come to the conclusion that the offence under Section 138 of the Negotiable Instruments Act was not made out against the accused and accordingly acquitted the accused from the charges levelled against him, which necessitated the complainant to prefer this appeal.

6.Now the point for determination in this appeal is whether the findings of the learned trial Court in C.C.No.114 of 2000 on the file of the Judicial Magistrate No.I, Erode, is pervers in nature to warrant any interference from this Court?

7.The Point:-

7(a) The learned trial judge has acquitted the accused on two grounds. The first one being the complainant has failed to prove that Ex.P.2-cheque was drawn by the accused only in order to discharge a subsisting liability and the second one being the impugned cheque-Ex.P.2 was drawn only to discharge a liability due to one Shanmugam, brother-in-law of the complainant, who was running a chit transaction in which the accused was a subscriber and that this cheque along with another cheque was handed over to the said Shanmugam as a security for the prize amount of the accused. The learned trail Judge has come to such a conclusion only on the basis of the evidence let in on the side of the accused through D.W.1 one Babu. P.W.1, power of attorney holder, even though has no knowledge about each and every money transaction of the complainant has in categorical terms admitted in the cross-examination itself that only in his presence the amount for Ex.P.2-cheque was given by the complainant to the accused and only to discharge the said loan the accused had drawn Ex.P.2-cheque in favour of the complainant. He has further deposed to the

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fact that the cheque Ex.P.2 was brought by the accused and only in his presence the accused had signed in the said cheque, after receiving the amount mentioned in it. So the reasoning of the learned trial judge that the complainant has failed to prove that there was no subsisting liability for which Ex.P.2-cheque was drawn by the accused cannot be sustainable.

7(b)The next point on which the learned trial Judge has thrown away the claim of the claimant is that Ex.P.2-cheque was given by the accused to one Shanmugam, the brother-in-law of the complainant, by way of security for the price amount in chit conducted by the said Shanmugam. But such a defence was not even raised by the accused by way of a reply notice even after the receipt of the notice issued by the complainant and received by the accused under Ex.P.7. The evidence of D.W.1 is of any use to the accused because D.W.1 is not a subscriber to the chit conducted by Shanmugam and he has not spoken to anything about the chit conducted by the said Shanmugam in which the accused claims to be a subscriber. The trial Court has admitted that the accused has failed to prove the defence through D.W.1 but has strangely relied on the evidence of D.W.1 and come to the conclusion that the claimant has failed to prove his claim. The accused has not chosen to enter into the box to prove that he was a subscriber in the chit conducted by the said Shanmugam. Under such circumstances, the defence taken by the accused that Ex.P.2-cheque was given as a security for the prize amount drawn by him in the chit conducted by Shanmugam holds no water. The accused admits his signature in Ex.P.2 and it is in evidence from P.W.1 that the impugned cheque Ex.P.2 was drawn to discharge a subsisting liablity of Rs.1,50,000/- received by the accused from the complainant in his (P.W.1) presence. Under such circumstance, the presumption under Section 139 of the Negotiable Instruments Act is that the holder of a cheque received the cheque, of the nature referred to in section 138, for the discharge, in whole or in part, of any debt or other liability. Under such circumstances, I hold that the accused is guilty under Section 138 of the Negotiable Instruments Act and accordingly convict the accused under Section 138 of the Negotiable Instruments Act.

7(c) When coming to the question of sentence following the ratio decidendi in 2004(2) SCC 235 (Goa Plast (P) Ltd. Vs. Chico Ursula D'Souza), I am of the view that the accused is liable to pay a compensation, viz., double the cheque amount. The relevant observation of the Honourable Apex Court in the above said dictum runs as follows:-

> "We have no doubt that the respondent has committed an offence punishable under the provisions of Section 138 of the NI Act and is liable to be punished. The transaction in question took place between the parties in the year 1993, therefore, Section 138, as it stood at the relevant time, would be applicable to the present case. Section 138 provides imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both. Section 138 has now been amended and the penalty of

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imprisonment for a term which may extend to one year has been substituted by two years as provided by the amending Act of 2002 and the fine which may extend to twice the amount of the cheque. This has been prescribed as the punishment for the offence under Section 138 of the Act.

The object and the ingredients under the provisions, in particular, Sections 138 and 139 of the Act cannot be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment enacted the aforesaid provisions. The remedy available in a civil Court is a long-drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee."

After observing in the above lines the Honourable Apex Court has given a month's time to the accused to pay a sum of Rs.80,000/- (twice the amount of the cheque) to the complainant with default sentence.

I am of the opinion that the same yardstick can be applied to the present facts of the case also. Point is answered accordingly.

9. In fine, two months time is given from this date to the respondent/accused to pay the compensation of Rs.3,00,000/- (twice the cheque amount) to the complainant in default the respondent/accused shall suffer SI for six months. The appeal is disposed of accordingly.

The services rendered by the learned Legal Aid Counsel Mr.G.Saravanan is recorded with appreciation. The Member Secretary of the Tamil Nadu Legal Services Authority is directed to pay Rs.3,000/- to the legal aid counsel towards his remuneration.

ssv

Sd/-
Asst.Registrar

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To,

1.The Judicial Magistrate No.I,
Erode.

2.-do-The Chief Judicial Magistrate,
Erode.

3. The Member Secretary,
Tamil Nadu Legal Services Authority,
Chennai.

+1 cc to Mr.G.Saravanan, Advocate Sr.No.41581.

+1 cc to Mr.N.Manokaran, Advocate Sr.No.41542.

SSV(CO)
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